No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF IN REPLY TO APPELLANT'S BRIEF IN SUPPORT OF SUPPLEMENTAL STATEMENT OF POINTS.

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OPENING STATEMENT.

After this cause had been assigned for hearing on October 22, 1948, appellant filed a motion requesting the Court's permission to supplement his statement of points and for leave to file a brief in support of said supplemental statement of points. On October 22, 1948, the foregoing motion was granted and appellee was given two weeks' time in which to file a brief in reply.

Each of the supplemental points which appellant now specifies as error relate to the instructions given by the trial court. Of the numerous instructions now claimed to be erroneous appellant made timely objection to but one.

ARGUMENT.

Twenty-first point raised: 21. The trial court did not err in giving to the jury the following instruction:

> "This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment." (T. R. 7, 8.)

(a) Since timely objection was not made to this instruction this alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) Instruction No. 3, when considered in its entirety is a correct statement of the law. A comparison of Instruction No. 3 with the instruction criticized in *Gomila v. United States,* 146 F. (2d) 372, cited by appellant, readily reveals that there is a vast difference between the two instructions. The objectionable portions of the instruction criticized in the *Gomila* case are overcome by those portions of Instruction No. 3, which read as follows:

> "It therefore becomes the duty, and it is encumbent upon the Government to prove every material element of the charge contained in the indictment to your satisfaction beyond a reasonable doubt."
>
> "The law presumes *every person* charged with crime to be innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless and

until, by the evidence introduced before you, you are convinced the defendant is guilty beyond a reasonable doubt." (T. R. 7; emphasis supplied.)

It is proper for the Court to instruct the jury that the presumption of innocence is not intended to aid those actually guilty but to prevent an innocent person from being convicted.

23 C.J.S., Sec. 1221, p. 782;
State v. Farnsworth, 51 Idaho 768, 10 P. (2d) 295;
People v. Flanagan, 340 Ill. 538, 173 N.E. 155;
State v. Medley, 54 Kan. 627, 39 P. 227;
State v. Hanlon, 38 Mont. 557, 100 P. 1035;
State v. Gee Jon, 46 Nev. 418, 211 P. 676.

Twenty-second and twenty-third points raised: 22 and 23. The trial court did not err in giving to the jury the following instructions:

(a) "If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon." (T. R. 8.)

(b) "The essential elements necessary for conviction of the crime of assault are as follows:

First, that the crime, if any, was committed at Anchorage, Alaska, on July 30, 1946, or at any time within three years prior to October 1, 1946;

Second, that at said time and place the defendant, not being armed with a dangerous weapon, did then and there unlawfully assault or threaten Frank Rowley in a menacing manner, or did then and there unlawfully strike or wound said Frank Rowley.

If you find that the defendant is not guilty of the crime of assault with a dangerous weapon as charged in the indictment, but you further find that the defendant is guilty of the crime of assault as hereinbefore defined, then you will return a verdict finding the defendant guilty of the crime of assault. But unless you find beyond reasonable doubt that the defendant is guilty of either the crime of assault with a dangerous weapon as charged in the indictment, or of the crime of assault, then you must acquit the defendant.

The defendant can be justly convicted of assault in the event only that you find beyond reasonable doubt that the defendant unlawfully assaulted Frank Rowley and that at the time of committing such assault the defendant was not armed with a dangerous weapon.

The defendant, if the proof justifies, may be found guilty of either the crime of assault with a dangerous weapon, or of the included crime of assault, but not of both." (T. R. 9, 10.)

(a) Since timely objection was not made to these instructions the alleged errors should not now be con-

sidered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The foregoing instructions are based upon Sections 4778 and 4779, Compiled Laws of Alaska, and are a correct statement of the law. Similar provisions are to be found in the Oregon Compiled Laws Annotated, Vol. 3, Sections 23-431 and 23-432. It was certainly not the duty of the court to endeavor to legislate by instructing the jury contrary to the express terms of the statutes involved.

If, as contended by appellant, confusion had resulted in the minds of the jurors by the giving of the aforementioned instructions, such confusion would probably have been indicated by a request for additional or supplemental instructions. Such requests quite frequently occur in the trial of criminal cases where there is some doubt or confusion as to a portion of the court's charge. The fact that no additional or supplemental instructions were requested clearly demonstrates that no confusion existed in the minds of the jurors and no clarification of the court's charge was necessary.

The weapon used in this case was a garden rake and was not dangerous per se. The jury were properly instructed that whether or not the defendant was armed with a dangerous weapon was for their determination. Assuming that the jury had concluded that the manner in which the rake was used did not constitute it a dangerous weapon, they certainly were not forced to return a verdict of guilty of assault with a

dangerous weapon nor precluded from considering and returning a verdict of simple assault. If the jury had found that the defendant was using the rake as an ordinary garden implement and while holding the same in his hand he had slapped or struck Frank Rowley with his other hand he would certainly be guilty of the crime of assault or assault and battery, under the explicit terms of Instruction 4-A. (T. R. 9, 10.)

Twenty-fourth point raised: 24. The trial court did not err in giving to the jury the following instruction:

> "Whether or not the defendant in this action was, at the time of the alleged assault, armed with a dangerous weapon is a question of fact which you are to determine from the evidence, and in doing so you are to take into consideration all of the circumstances disclosed by the evidence. Unless you are satisfied beyond a reasonable doubt from all of the circumstances in the case that he was armed with a dangerous weapon which, under the circumstances, was capable of producing death or great bodily injury, then you must acquit the defendant of the crime of assault with a dangerous weapon." (T. R. 10.)

(a) Since timely objection was not made to this instruction the alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The foregoing instruction is a correct statement of the law. When the weapon used is not dangerous per se; or is not one declared by statute to be dangerous; or where its character depends on the manner in which it is used, the question whether there was an assault with a dangerous weapon is a question for the determination of the jury.

Appellant states that because the element of assault *with such weapon* is entirely left out of this instruction it is clearly erroneous. The complete answer to this claim of error is found in Instruction No. 4, where the court in defining the essential elements of the crime of assault with a dangerous weapon stated:

> "Second, that at said time and place the said defendant, Z. E. Eagleston, being then and there armed with a dangerous weapon, to wit, a long-handled garden rake, did then and there wilfully, feloniously and unlawfully, *make an assault* upon another person whose name is Frank Rowley, *with said dangerous weapon,* * * *" (T. R. 8; emphasis supplied.)

Twenty-fifth point raised: 25. The trial court did not err in giving to the jury the following instruction:

> "Part of the evidence in this case is of the kind called 'circumstantial.' Circumstantial evidence is a type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from

the facts testified to according to reason and the common experience of mankind. There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence. It is sometimes quite as convincing as direct and positive evidence of eye witnesses; in other cases less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be more consistent with guilt than with innocence." (T. R. 12.)

Appellant contends that this instruction is erroneous in that it puts proof of guilt or innocence on a comparative basis and does violence to the rule requiring proof beyond a reasonable doubt. This objection seems entirely unfounded when the last paragraph of the foregoing instruction, which reads as follows, is considered:

"In this case the proof consists of both direct and circumstantial evidence. Both should be carefully considered. It is for you to determine the weight of the circumstantial evidence as well as of the direct evidence, neither enlarging nor belittling the force of either; *and if all the evidence,* when taken as a whole and fairly candidly weighed, *convinces you beyond reasonable doubt of* the defendant's guilt, a verdict should be returned accordingly; otherwise the defendant should be acquitted." (T. R. 12; emphasis supplied.)

Where the prosecution relies solely or substantially on circumstantial evidence, or conviction may be had

on such evidence alone, the court should instruct upon the law relating to such evidence, although a specific instruction need not be given if the subject is fully covered by other instructions. Where, however, there is direct evidence sufficient, if believed, to convict, an instruction on circumstantial evidence, although there is such evidence in the case, is not necessary and properly may be refused, although it is proper to give such an instruction if the case is partially dependent on circumstantial evidence.

23 C.J.S., Sec. 1250, pp. 808-813.

The law does not require that a charge upon circumstantial evidence should be couched in any particular set of words or phrases, provided it is correct in substance and is so expressed that the jury readily can comprehend the meaning of the language employed, and provided it defines or explains circumstantial evidence and fully and concisely states the rules governing its effect, and the degree of proof required for conviction. It is proper to charge that circumstantial as well as direct evidence is legal and competent to establish accused's guilt.

23 C.J.S., Sec. 1251, pp. 814-815.

In the present case there is sufficient direct evidence, if believed, to warrant a conviction. It would appear that the court might well have omitted Instruction 4-E.

United States v. Arrow Packing Corp., 2 Cir., 153 F. (2d) 669;

United States v. Austin-Bagley Corp., 2 Cir., 31 F. (2d) 229, 234;

United States v. Becker, 2 Cir., 62 F. (2d) 1007, 1010.

See also:

McCoy v. United States, 9 Cir., No. 11,474.

However, the instruction as given does not affect any substantial right of the appellant, inasmuch as the court specifically instructed the jury that upon the evidence as a whole they must be convinced of the defendant's guilt beyond a reasonable doubt.

Twenty-sixth point raised: 26. The trial court did not err in giving to the jury the following instruction:

> "No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty." (T. R. 18.)

(a) Since timely objection was not made to this instruction the alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The foregoing instruction is a correct statement of the law. In *Shepard v. United States,* 9 Cir.,

236 Fed. 73, this Court approved a very similar instruction, which read in part as follows:

> "Before a verdict of guilty can be rendered, each member of the jury must be able to say, in answer to his individual conscience, that he has in his mind arrived at a *fixed opinion,* based upon the law and the evidence of the case, and nothing else, that the defendant is guilty." (Emphasis supplied.)

Appellant contends that the use of the term "settled conviction" tends to minimize the fundamental rule requiring proof beyond a reasonable doubt. However, in Instruction No. 6 (T. R. 14) the court gave a detailed explanation of the meaning of the term "reasonable doubt." Many other portions of the instructions are a constant reminder to the jury that proof beyond a reasonable doubt is required.

Under a somewhat similar situation, this Court, in *Wilton v. United States,* 9 Cir., 156 F. (2d) 433, 435, stated:

> "Appellant also complains that 'the charge amounted to a direction to find the defendant guilty if the main facts were *believed* by the jury to be true.' The point being that mere belief was sufficient as distinguished from the requirement that the belief must be beyond reasonable doubt. However, the instructions abound in expressions that such belief must be beyond a reasonable doubt."

Twenty-ninth point raised: 29. The trial court did not err in giving the three forms of verdict submitted

to the jury in the numerical order in which they were given and by numbering them in the manner in which they were numbered without further instructing the jury that they were to make no inference from the fact that the instructions were given in such numerical order and so numbered.

(a) Since timely objection was not made to this instruction (T. R. 20) this alleged error should not now be considered. In support of this statement appellee respectfully requests the Court to consider the authorities cited in appellee's opening brief, pages 12-15.

(b) The giving of Instruction 12 (T. R. 20) in the manner given was proper. Assuming, but not admitting, that the court should have cautioned the jury that no inference was to be drawn from the manner in which the verdicts were numbered, this slight irregularity should be disregarded.

Federal Rules of Criminal Procedure, Rule 52(a).

Thirtieth point raised: 30. The trial court's instructions when considered as a whole, fairly and accurately stated the law of the case and adequately protected appellant's rights.

Provided they are consistent with each other, all instructions given in the case should be read together and construed as a whole, each instruction or the parts thereof being considered in the light of the other instructions or parts bearing on the same sub-

ject, and particular words or expressions should be construed in connection with that portion of the charge from which they are taken. If, when so construed, the instructions state the law fully, clearly, and correctly, they are sufficient, although some particular instruction or portion thereof, standing alone, might be subject to objection.

23 C.J.S., Sec. 1321, pp. 921-925.

See also:

Boyd v. United States, 271 U. S. 104;

Taylor v. United States, 9 Cir., 142 F. (2d) 808;

Hargreaves v. United States, 9 Cir., 75 F. (2d) 68;

Johnson v. United States, 9 Cir., 59 F. (2d) 42;

Peters v. United States, 9 Cir., 94 Fed. 127.

The trial court properly instructed the jury in this respect, as follows:

> "You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions." (T. R. 19.)

The trial court's instructions, when construed as a whole, fully, clearly, and correctly state the law of the case.

CONCLUSION.

Appellant's rights were adequately protected at all stages of the trial. The case was submitted to the jury under proper instructions. The verdict of the jury should be affirmed.

Dated, Anchorage, Alaska,
October 27, 1948.

Respectfully submitted,

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United States Attorney,
Attorney for Appellee.